

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 96-1694-CR
96-1695-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS R. ARMSTRONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Dennis Armstrong appeals from the judgment of conviction entered against him and the order denying his postconviction motion to modify his sentence. The issues on appeal are whether Armstrong's guilty plea was properly entered and whether the circuit court properly exercised its discretion

in sentencing Armstrong. Because Armstrong did not move to withdraw his plea before the circuit court, and because we conclude that the circuit court properly sentenced Armstrong, we affirm.

Armstrong pled guilty to burglary as a repeater in violation of §§ 943.10(1)(a) and 939.62, STATS.¹ During the plea colloquy, the circuit judge did not ask Armstrong, among other things, if he understood that the court was not bound to accept the recommended sentence.² At Armstrong's request, the court sentenced him immediately without the preparation of a presentence report. The joint sentencing recommendation was for six years. The circuit court sentenced Armstrong to eight years. Armstrong then moved the circuit court to modify his sentence arguing that the sentence was unduly harsh. The circuit court denied the motion.

The first issue Armstrong raises on his appeal is that his plea was not knowingly, voluntarily and intelligently made because the circuit court did not ask Armstrong certain questions during the plea colloquy. The relief he seeks is to withdraw his plea. Before this court can consider whether he is entitled to withdraw his plea, however, he must move to withdraw it before the circuit court. *See State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 677-78, 556 N.W.2d 136, 137 (Ct. App. 1996). Since he has not moved the circuit court to withdraw

¹ Armstrong took cigarettes and beer from a bar. The court fixed the amount of restitution he owed at \$162.72.

² Armstrong had signed and discussed with his lawyer a plea questionnaire which apparently explained that the court was not required to accept the recommended sentence.

his plea, we cannot consider this issue on appeal and the issue is deemed waived.³ See *id.* at 678, 556 N.W.2d at 137-38.

The second issue on appeal is whether the circuit court properly exercised its discretion in imposing the sentence it did. There is a strong public policy against a reviewing court interfering with the sentencing discretion of a circuit court. See *State v. Mosley*, 201 Wis.2d 36, 43, 547 N.W.2d 806, 809 (Ct. App. 1996). The defendant bears the burden of showing that there was “some unreasonable or unjustifiable basis for the sentence imposed.” *Id.* (citation omitted).

The sentencing court should consider three primary factors: (1) the gravity of the offense; (2) the character and rehabilitative needs of the defendant; and (3) the need to protect the public. *State v. Paske*, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991) (citation omitted). In addition, the court must consider the defendant’s criminal record, his attitude and demeanor, and whether he shows remorse. *Id.* (citation omitted). Although all the relevant factors must be considered, the sentence may rest more on one factor than another. *Mosley*, 201 Wis.2d at 44, 547 N.W.2d at 809 (citation omitted).

The record in this case establishes that the sentencing court considered the gravity of the offense, Armstrong’s statement that he blamed the victim of the crime, his apparent continued harassment of the victim, his belief that he had not been wrong, and his extensive criminal record. Specifically, the

³ At the hearing on Armstrong’s postconviction motion to modify his sentence, Armstrong’s counsel mentioned that the court had not asked Armstrong whether he understood that the court could reject the joint sentencing recommendation. This statement, however, was part of his argument that the sentence imposed was excessive. He did not submit a request to withdraw the plea.

court discussed that although Armstrong “didn’t take much of anything,” he still did not understand that what he had done was wrong. The court further stated that Armstrong continued to blame the owner of the bar for not allowing him to “weasel out” of what he had done. The court discussed Armstrong’s extensive criminal record and then concluded “you have not learned to conduct yourself the way a citizen of this country should conduct themselves, and that’s to respect the rights of others.” The court further considered that Armstrong had not been apologetic but rather had been “ugly with it.” The court, therefore, considered the primary factors in determining Armstrong’s sentence. Since the court properly exercised its discretion, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5., STATS.

